Supreme Court, U.S.
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86-370

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

JERRY G. BRENNAN,
Petitioner,

v.

DEPARTMENT OF HEALTH AND
HUMAN SERVICES,
Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

JUDGE JERRY G. BRENNAN
Box 1355
Middlesboro, KY 40965

Petitioner
Pro Se

110pp

QUESTION PRESENTED FOR REVIEW

Whether an administrative law judge can be disciplined for maintaining his judicial independence and not cooperating with the Social Security Administration's attempt to mass produce decisions of disability claims by delegating the power of deciding relevance and admissibility of evidence to clerks not under the control of the judge.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Jerry G. Brennan petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Federal circuit is contained in

the Appendix ("App.") at 1a. The opinions of the Merit Systems Protection Board are reported at 19 MSPB 335 (1984); 20 MSPB 35 (1984); and 27 MSPB 242 (1985). (App. 21a, 46a, 61a.)

JURISDICTION

The judgment of the Court of Appeals for the Federal Circuit was filed on April 3, 1986. (App. 18a.) The Court of Appeals for the Federal Circuit denied rehearing, June 2, 1986 and rehearing en banc, June 10, 1986 (App. at 19a and 21a.) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES

The pertinent provisions of the Administrative Procedure Act ("APA"), as amended, 5 U.S.C. § 556(c)(3), (5) and

(7), and 5 U.S.C. § 7521, are found at App. 67a and 69a.

STATEMENT OF THE CASE

On January 2, 1981, a new Administrative Law Judge in Charge ("ALJIC") came to the Office of Hearings and Appeals, Social Security Administration ("SSA") in Middlesboro, Kentucky. I was one of the judges already assigned there.

Determining that there was a backlog of cases in the office the ALJIC "pooled" the employees, so that the attorneys, hearing assistants, secretaries, and typists all reported to him instead of being assigned to and rated by myself or other judges. In the language of the agency this process of breaking up the unit of several employees assigned to each judge, so that all of the clerical

employees report directly to the ALJIC, is known as "reconfiguration."

Under the "reconfiguration" policy of SSA, employees are "pooled" to ensure mass production of decisions, their performance ratings are signed by office managers rather than the judge, and the judge no longer has a staff.[1] Cofer, Judges, Bureaucrats and the Question of Independence: A Study of the Social Security Administration Hearing Process (1985) at pp. 143-44.[2] Under reconfigura-

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[1] (App. at 64a.)

[2] "Reconfiguration" has subsequently become the policy throughout the Office of Hearings and Appeals. See the Resolution of the Executive Committee of the Federal Administrative Law Judges Conference criticizing reconfiguration. (App. 71a.)

Federal district judges appoint their own law clerks and secretaries. 28 U.S.C. § 752. So do bankruptcy judges, 28 U.S.C. § 156, and magistrates, 28 U.S.C. § 635. Judges on the Court of Claims, who like administrative law judges are Article I judges, also appoint their own law clerks

tion the clerical personnel who worked on my cases, and over whom I had no authority, upsurped my judicial function by deciding questions of relevance and admissibility of evidence. I objected to this interference with my decisional independence and tried to keep control of my own case files.

On April 2, 1982, the Office of Hearings and Appeals of the Social Security Administration filed with the Merit Systems Protection Board ("MSPB") a complaint pursuant to 5 U.S.C. § 7521 requesting my removal as an administrative law judge. In eleven specifications, the complaint alleged unacceptably low productivity and insubordinate conduct. The MSPB dismissed all but the charge in specification 4 of charge II alleging failure to follow office procedures.

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and secretaries. 28 U.S.C. § 794.

On April 3, 1986, the Court of Appeals for the Federal Circuit affirmed the decision of the MSPB upholding my suspension for sixty days, without pay or benefits, in effect amounting to a fine of more than $10,000. The panel found substantial evidence in the record that contrary to mandatory office procedure: (1) I wanted to open mail addressed to me, and (2) I wanted to use my own work sheet, rather than one provided by the office, to keep a history of cases assigned to me for hearing.

The Court of Appeals held (App. 15a.) that "the record clearly contains substantial evidence to support the

finding of no decisional interference."[3] The only evidence in the record on this issue, which neither the MSPB nor the court cited, is in a few of the pages from the transcript of my trial. This evidence shows how clerical employees at SSA offices perform the judicial function of deciding relevance and admissibility of evidence.

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[3] The court apparently held that it was the agency's burden of proof to make a prima facie showing of the failure to comply with office administrative procedures and that those procedures do not interfere with the judge's decisional independence. (App. 13a-14a.) The only evidence cited by the MSPB for the finding that the office procedure did not interfere with my decisional independence was my testimony that I would not follow the procedures because I prefer to do things my way. (App. 35a.)

REASONS FOR GRANTING THE WRIT

I. This Petition Involves a Precedent-Setting Question of Exceptional Importance Involving the Due Process Rights of Thousands of Disability Claimants and the Decisional Independence of Hundreds of United States Administrative Law Judges

This matter involves my decisional independence while presiding over the hearing of Social Security disability hearings.[4] The Administrative Procedure Act and this Court contemplate that such disability hearings will be controlled by

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[4] The independence granted to administrative law judges is designed to maintain public confidence in the essential fairness of the process through which Social Security benefits are allocated by ensuring impartial decisionmaking. Nash v. Califano, 613 F.2d 10, 16 (2d Cir. 1980). This judicial independence is of Constitutional dimension. Without it there can be no due process of law. Id. at 17-18. It was not created for the benefit of judges but for the benefit of the judged. Id. at p. 16, n. 12; Kaufman, Chilling Judicial Independence, 88 Yale L.J. 681, 712 (1979).

the judge from the time the case is assigned until the decision is issued; this Court has held that SSA administrative law judges have a "duty of inquiry" obligation in a disability case where the claimant is unrepresented by counsel to inform themselves of facts relevant to their decisions; Congress and this Court have rejected the establishment of quotas and mandatory deadlines in the processing of disability cases, holding that quality-crafted hearing decisions take precedent over any policy to encourage mass production of decisions; Congress has expressed concern that mass produced disability decisions produce undesirable uniformity and a loss of quality in agency decisions; and the Court has found that administrative law judges should be afforded sufficient time to deliberate to ensure accurate decisions

and to schedule new consultative exams if additional evidence is required. Heckler v. Day, 104 S.Ct. 2249, 2253-57 (1984); Richardson v. Perales, 402 U.S. 389, 410 (1971).

This Court has recognized the importance of protecting the independent judgment of administrative law judges. In Butz v. Economou, 438 U.S. 478, 513-14 (1978), the Court held:

> There can be little doubt that the role of the modern federal hearing examiner or administrative law judge within this framework is 'functionally comparable' to that of a judge. His powers are often, if not generally, comparable to those of a trial judge: He may issue subpoenas, rule on proffers of evidence, regulate the course of the hearing, and make or recommend decisions. See § 556(c). More importantly, the process of agency adjudication is currently structured so as to assure that the hearing examiner exercises his independent judgement on the evidence before him, free from pressures by the parties or other officials within the agency. Prior to the

Administrative Procedure Act, there was considerable concern that persons hearing administrative cases at the trial level could not exercise independent judgement because they were required to perform prosecutorial and investigative functions as well as their judicial work, see, e.g., Wong Yang Sung v. McGrath, 339 U.S. 33, 36-41 (1950), and because they were often subordinate to executive officials within the agency, see Ramspeck v. Federal Trial Examiners Conference, 345 U.S. 128, 131 (1953). Since the securing of fair and competent hearing personnel was viewed as 'the heart of formal administrative adjudication,' Final Report of the Attorney General's Committee on Administrative Procedure 46 (1941), the Administrative Procedure Act contains a number of provisions designed to guarantee the independence of hearing examiners. They may not perform duties inconsistent with their duties as hearing examiners. 5 U.S.C. § 3105 (1976 ed.). When conducting a hearing under § 5 of the APA, 5 U.S.C. § 554 (1976 ed.), a hearing examiner is not responsible to or subject to the supervision or direction of employees or agents engaged in the performance of investigative or prosecution functions for the agency. 5 U.S.C. § 554(d)(2) (1976 ed.). Nor may a hearing examiner consult any person or party, including other agency officials, concerning a fact at

issue in the hearing, unless on notice and opportunity for all parties to participate. § 554(d)(1). Hearing examiners must be assigned to cases in rotation so far as is practicable. § 3105. They may be removed only for good cause established and determined by the Civil Service Commission after a hearing on the record. § 7521. Their pay is also controlled by the Civil Service Commission.

In light of these safeguards, we think that the risk of an unconstitutional act by one presiding at an agency hearing is clearly outweighed by the importance of preserving the independent judgement of these men and women. We therefore hold that persons subject to these restraints and performing adjudicatory functions within a federal agency are entitled to absolute immunity from damages liability for their judicial acts. Those who complain of error in such proceedings must seek agency or judicial review.[5]

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[5] In changing the title of "hearing examiner" to "administrative law judge" Congress recognized the nature of the office: "In essence, individuals appointed as Administrative Law Judges hold a position with tenure very similar to that provided for federal judges under the Constitution." S. Rep. No. 697, 95th Cong., 1st Sess. 2 (1978), reprinted in 1978 U.S. Code Cong. & Ad. News 496-97.

This is not the first time that respondent's management procedures have interfered with the decisional independence of administrative law judges; they have been held to have:

> created an untenable atmosphere of tension and unfairness which violated the spirit of the Administrative Procedure Act, if no specific provision thereof. [Respondent's] insensitivity to that degree of decisional independence the APA affords to administrative law judges . . . could have tended to corrupt the ability of administrative law judges to exercise that independence in the vital cases that they decide.

Ass'n of Administrative Law Judges, Inc. v. Heckler, 594 F.Supp. 1132, 1143 (D.D.C. 1984). See also, Gulan v. Heckler, 583 F.Supp. 1010, 1017-18 (N.D. Ill. 1984):

> The ALJ's performance falls far short of the level of objective and fair justice that judges in the United States are expected to achieve. The reasons for these apparently frequent injudicial

> performances by HEW Administrative Law Judges are not clear although there have been suggestions that they are the result of pressures brought to bear on them by executives in the department for political and fiscal reasons. If this is the case, it should stop. There is no room in our system of justice for Nazi or Soviet-type misuse and abuse of judges and no ALJ should be exposed or succumb to such pressure.

In Salling v. Bowen, Civil No. 82-0428-B, W.D. VA, July 16, 1986, the court enjoined a program ("SSARP/AIP") by SSA whereby an attorney representing the agency would "remove the burden of case record development from ALJs" in the same manner as SSA has delegated that function to clerks under reconfiguration. The court found that (slip opinion at pp. 32-33 and 50-52):

> . . . .Instead of going to the OHA in Kingsport, the claim file goes directly to the SSARP office and remains under its control until such time as the case is ready for hearing. Only then will the ALJ see

the file and have anything to do with the case. The SSARP offices do all the prehearing screening, case docketing, control, selection of documents to be included in the hearing exhibit, preparation of the exhibit list, preparation and release of development requests, contact with the attorney if there is one, and contact with the claimant where there is no attorney and direct intervention on the part of an SSAR where the person is not represented, by communication with the claimant. Indeed, the ALJ who will eventually try the case will not know that he is assigned to the case until the case has been received in the OHA for hearing. The SSARP, now AIP, whose employees are employed and under the direct control of the OHA will have complete control of the file without the ALJ even seeing it until the time of the hearing. This again acts as a halter on the independence of the ALJs in the handling of cases, and places the file not in the hand of an independent person but in the hands of an advocate of the government.

. . . .

In this experimental Social Security program, the suit is brought and the file remains in the hands of one attorney (an adversary) and the other one does not have possession of the file until such time as the ALJ gets to hear it and the ALJ does not have the file until

such time as he gets ready to hear the case. The ALJ is required to develop the case but is prevented from doing so because it is in the hands of an SSAR who is representing one side of the case. The SSAR is free to develop the file in any manner he sees fit. We are all aware of the unfortunate situation in which a person can be sent to enough doctors until one will find or make some different diagnosis from the others or will fail to diagnose any impairment. All that is needed is one doctor to say something contradictory and there is a factual issue which has to be resolved.

. . . .

This court finds that both the SSARP and the AIP are simply nothing more nor less than an attempt by the bureaucracy to control the independence of the ALJs. Their mission is to employ people who will have control of the files before they go to the ALJ. This program began in an announced purpose of having the representatives develop the case and permit the judge to sit and objectively hear and, if necessary, further develop and decide the case. By giving the file to the SSAR instead of to the ALJ it permits the government a second chance to defeat the claim by new medical evidence without the claimant knowing anything about it. It affords the opportunity for the SSARs to go fishing for

> additional evidence to support the government's position. In essence, there are persons in the administration who do not trust judges and in particular, do not trust ALJs and who want to destroy their independence, and have used the SSARP and AIP process to aid in their efforts. . . .

The record in this case, I sumbit, also shows that reconfiguration is a similar attempt by SSA to destroy the independence of administrative law judges.

II. The Record Shows That Under the "Reconfiguration" Policy of the Social Security Administration the Clerks Perform Functions Within the Adjudicative Responsibility of the Judge

My insistence on opening mail addressed to me, and on using my own worksheets, was within my responsibility to control the case under the Administrative Procedure Act, 5 U.S.C. §

556(c)(3), (5) and (7).[6] (App. 69a-70a.) This responsibility clearly includes deciding relevance and admissibility of evidence. The record in this case shows, however, that under "reconfiguration"[7] these decisions are often performed by clerks who are not under the direction or control of the judge. The administrative law judge in charge of my office testified that, because I wanted mail addressed to me to be delivered to me first, his

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[6] That statute places on that the administrative law judge the responsibility to receive relevant evidence, regulate the course of the hearing, and dispose of procedural requests.

[7] Although their attempt to place quotas of cases to be decided per month for each judge was held statistically invalid (App. 48a-50a.), respondent can achieve the same result by placing the quotas on clerical personal. Under "reconfiguration" respondent can place quotas on law clerks, requiring them, for example, to write "2.4 to 2.9 decisions per 8 hours of duty."

hearing assistants, working on cases assigned to me, were deprived of the ability to decide what evidence was needed in the case. (". . . [T]hey couldn't associate the mail, such as a consultative examination report that would be evidence in the file."):[8]

> Q. Were there other examples where the employees complained to you that office procedures were being undermined or short-circuited or any way hampered by Judge Brennan's actions?
>
> A. Yes, sir.
>
> Q. Could you name another example?
>
> A. In regard to the mail?
>
> Q. Yes.
>
> A. Well, as I stated before, it was a frequent occurrence that the hearing assistant or hearing clerk would complain

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[8] In the jargon of the agency, "associate the mail" means to select documents from the mail and place them in the case file as evidence. Transcript Vol. I at pp. 83, 88-89.

that they couldn't associate the mail, such as a consultative examination report that would be evidence in the file. It would be the responsibility of the support staff under their job descriptions to associate these things and present them to the judge. Frequently they were not able to get the two together.

. . . .

Judge Reidy: All right. Before we go to cross, I have just one question if you could expand on. You were asked a line of questions relating to Judge Brennan's handling of the mail which prompted some of the staff to complain that it interfered with their ability to perform their function is the way I heard your testimony. I am not sure if the record is clear on, or if you know: What procedures did Judge Brennan follow that were so different from the norm -- or I understand there to be a norm that was followed by the others -- which caused this difficulty? Do you understand my question and could you expand on that?

The Witness: I think so. Yes, sir. As I have explained before, we have primarily hearing clerks, hearing

assistants and judges and typists in the office. Each of them has a separate job description and in many instances, the job description will read that without supervision this employee shall do thus and so which would include associating the mail and determining relevance and things like that.

The procedure of handling the case-related mail, unless it is marked confidential or personal, is that the mail clerk opens it, stamps it as to when it is received in and routes it to either a hearing assistant or hearing clerk who has the specific duty of associating that as a exhibit or to consider whether it would be received by the judge or not.

In Judge Brennan's case many times they would complain that, we can't find the case, that he has his mail and hadn't routed it back to us where we can perform our function, that type of thing.

My former hearing assistant also testified about how she wanted to make these decisions on what evidence the file

would contain in order to further her career advancement:[9]

> Q. Ms. Fluty, would you describe generally how Judge Brennan handled his office duties as a judge? Could you give specific examples of what he did in regard to mail or how it flowed?
>
> A. How it disrupted the office procedure?
>
> Q. Right.
>
> A. Okay. Normally, the cases would come into a unit and the hearing assistant would perform all the duties I described a minute ago. And she would be able to give accurate reports on the status of those cases, which was necessary for the office itself to function smoothly, to see where each case was, what the status of each case was. That was difficult to do in Judge Brennan's unit because it was handled very differently. Each step was controlled by Judge Brennan.
>
> For example, mail on cases went directly to Judge Brennan

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[9] Transcript Vol. IV at pp. 35-38.

rather than the hearing assistant. So you had no way of knowing whether a certain document had come back to be associated with the file, to state whether or not the next step was ready to be performed.

Q. And that was not normal office procedure?

A. No. No, it was not. Normally the hearing assistant was given the responsibility of associating mail and determining what was to be done next. I mean, she has years of experience at doing that and a Grade 8 hearing assistant would know what to do with the mail. But that was not the way it was handled in Judge Brennan's unit at all.

. . . .

Q. How did Judge Brennan control his cases?

A. Everything that was done on the cases was decided by Judge Brennan.

Q. Could you set up a routine case development?

A. No. No, I could not. It's standard usually that any hearing assistant --

Mr. Zwerdling: Sorry, can't hear the witness. It's standard what?

The Witness: The standard procedure for a Grade 8 hearing assistant is to establish some type of format for case work to be done. If you're going to request a medical report from a doctor, that's a routine procedure. You just send out the letter and request it, and it comes back and you associate it with the file. And when everything is there, you close it out and give it to the judge.

No standard format could be established in Judge Brennan's unit for getting that type of thing done. Everything was very individual, by him.

By Mr. Kottas:

Q. Was Judge Brennan utilizing you as a Grade 8?

A. No, sir, he was not.

Q. Would you please describe and give examples of how he was not using you as a Grade 8?

A. A Grade 8 would be given the responsibility of the work flow, the flow of the case through the unit. She was considered responsible for each step that took place on a file. And there was no responsibility given and

everything was very closely supervised. And a Grade 8 should not require that supervision.

Q. Did you ever worry about being downgraded?

A. Yes, I did. If you're not doing Grade 8 level work, you can't maintain the grade. And I was not doing Grade 8 work. I knew that I would be downgraded for that.

I testified about my purpose in asking that I be allowed to decide which medical reports and other documents were needed in cases assigned to me:[10]

Q. I was trying to increase the quality and the rate of disposition because the danger would be if I didn't know -- if I didn't read a medical report and know whether I needed further reports, or whether the report met our requests or not, or whether the attorney, if an attorney submitted something, whether it was adequate, or whether it complied with his understanding with me made at

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10 Transcript Vol. V at pp. 41-42.

the hearing, or subsequently, I wouldn't know. That case might lie idle because of the fact that the hearing assistant or secretary wouldn't know what to do. I was the person supposedly directing the conduct of the case. Not the flow of the work, but the conduct of the case.

And the second thing was that there is a tendency in I think most of these offices for a lack of communication where the staff does not meet with the judge to talk over these cases, particularly with hearing assistants. I think that the hearing assistants should meet with the judge, they are both familiar with the case, they've both heard the case, they both can decide immediately what should be done, and in the unit system you hand the file to the hearing assistant and say "Please get a consultative covering such and such," or "write so and so please, and find out if he needs anymore time on his development," or whatever it may be. But without that communication, without my seeing the mail and conferring with the hearing assistant, its like living in a vacuum, at least it is to me. Different judges of course have different work habits, and I understand that.

CONCLUSION

Since the statutes and this Court put the responsibility on the administrative law judge for building a proper record in disability cases, decisions on what evidence goes into the file should be made by the judge or by an employee under the judge's supervision and control. Reconfiguration puts this power in the hands of employees not responsible to the judge deciding the case. When I protested this arrangement I was unjustly sanctioned.

For the above reasons, petitioner respectfully requests that the Court issue a Writ of Certiorari to review the judgment and opinion of the Court of Appeals for the Federal Circuit entered in this case.

Respectfully submitted,

JERRY G. BRENNAN, pro se

Dated: September 3, 1986

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

JERRY G. BRENNAN,	)	
	)	
Petitioner,	)	
	)	
v.	)	Appeal No.
	)	85-2477
	)	
DEPARTMENT OF HEALTH AND HUMAN SERVICES,	)	
	)	
	)	
Respondent.	)	

DECIDED: April 3, 1986

Before MARKEY, Chief Judge, SMITH and BISSELL, Circuit Judges.
BISSELL, Circuit Judge.

This is an appeal from the decision of the Merit Systems Protection Board (Board), Docket No. HQ75218210010, 27 M.S.P.R. 242 (1985), affirming the recommended decision to suspend for 60 days Jerry G. Brennan (petitioner), a Social Security Administration (agency) administrative law judge (ALJ). We affirm.

BACKGROUND

The agency proposed the removal of petitioner on April 2, 1982, pursuant to 5 U.S.C. § 7521(a) (1982), on charges of unsatisfactory productivity and disruptive and insubordinate conduct. In accordance with 5 C.F.R. § 1201.132 (1982), the Board designated an ALJ as presiding official to hear the case and to issue a recommended decision. The ALJ concluded that the agency had established good cause to remove petitioner on both the low productivity and misconduct grounds and recommended that the Board sustain the two charges. On February 6, 1984, the Board remanded the case to the ALJ for issuance of a supplemental recommended decision on whether the agency had met the "good cause" standard of section 7521 and whether the new office procedures

improperly interfered with petitioner's ability to hold full and fair hearings and render complete and reasoned decisions. 19 M.S.P.R. 335 (1984), opinion clarified 20 M.S.P.R. 35 (1984). The questionable behavior engaged in by petitioner was that, contrary to mandatory office procedures, he insisted that all mail concerning his cases be delivered to him prior to its being logged in at a central location and he refused to use standardized office worksheets to monitor the progress of his cases. Additionally, the Board ruled that the agency's statistical evidence regarding petitioner's low productivity was inadequate because it did not validly measure comparable levels of production

On September 18, 1984, the ALJ issued a supplemental recommended decision finding that the new office procedures did

not interfere with petitioner's ability to hold full and fair hearings and to render complete decisions and was "good cause" for removal. On appeal after remand, the Board authorized the agency to suspend petitioner for a period up to 60 days. 27 M.S.P.R. 242 (1985). Petitioner appealed the Board's final decision raising the issue for whether the decision of the Board's finding that the agency had good cause to suspend petitioner for 60 days was supported by substantial evidence, was not arbitrary or capricious, and was obtained through use of the procedures required by law.

OPINION

Actions against administrative law judges are permitted only by following the proscriptions of 5 U.S.C. § 7521(a) (1982) which provides:

> An action may be taken against an administrative law judge appointed under section 3105 of this title by the agency in which the administrative law jduge is employed only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board.

Actions subject to this section taken against an ALJ include both removal and suspension. 5 U.S.C. § 7521(b)(1), (2) (1982).

To be sustained, the charges brought against petitioner must be supported by a preponderance of the evidence. 5 U.S.C. § 7701(c)(1)(B) (1982). A preponderance of the evidence is specifically defined in 5 C.F.R. § 1201.56(c)(2) (1982) as "[t]hat degre of relevant evidence which a reasonable mind, considering the record as a whole, might accept as sufficient to support a concludion that the matter asserted is more likely to be true than

not true." See also Steadman v. Security Exchange Commission, 450 U.S. 91, 100-02 (1981).

Petitioner concedes that he did the acts that are the basis of the charge against him. Nevertheless, he argues that his behavior does not constitute "good cause" within the meaning of the statute, the notice of the charge was not sufficiently specific, and the Board shifted the burden of proof to him to prove that the agency lacked good cause to take this action.

With regard to the specificity of the notice, the charge against petitioner states that he "displayed a pattern of disruptive, insubordinate, obstructionist and dilatory conduct . . . and followed his own procedures regardless of established office routine and standard procedures . . . ."

The purpose of an agency's notice of charges is to put an employee on notice of the allegations against him in sufficient detail to apprise him of the allegations he must refute or acts he must justify. See Burkett v. United States, 402 F.2d 1002, 1004 (Ct. Cl. 1968); accord DeSarno v. Department of Commerce, 761 F.2d 657 (Fed. Cir. 1985). We are persuaded that this charge constituted sufficient notice to petitioner, particularly, in light of the fact that petitioner did attempt to justify his behavior.

Once the charge is made, it is the agency that bears the burden of proof. If the charge is found supported by the preponderant evidence, it must then be decided whether the conduct in question is good cause to suspend petitioner from his position for 60 days.

Congress intentionally failed to define "good cause" in the Administrative Procedures Act (APA). Rather, "good cause" is to be given meaning through judicial interpretation as is evident by Senator McCarran's comments in the APA's legislative history:

> [I]t will be the duty of reviewing courts . . . to determine the meaning of the words and phrases used, insofar as they have not been defined in the bill itself. For example, in several provisions of the bill, the expression "good cause" is used. The cause so specified must be interpreted by the context of the provision in which it is found, and the purpose of the entire section and bill. The cause found must be real and demonstratable. If the agency is proceeding upon a statutory hearing and record the cause will appear there; otherwise, it must be such that the agency may show the facts and considerations warranting the finding in any proceeding in which the finding is challenged. The same would be true in the case of findings other than of good cause, required in the bill.

Administrative Procedure Act--Legislative History, S.Doc. No. 248, 79th cong., 2d Sess. 326 (1946).

A succinct definition for "good cause" has not been provided by the judiciary. However, in Ramspeck v. Federal Trial Examiners Conference, 345 U.S. 128 (1953), the Court ruled that reduction in force procedures were applicable to ALJs. In so ruling, the Court rejected the assertion that by enacting the APA Congress intended to be the equivalent of federal judges and that "good cause" should be equated with the "good behavior" standard applicable to Article III judges. While Congress' "good cause" standard was left to the courts to define, APA does provide the parameters within which the courts must work.

The APA has provisions to insure the decisional independence of the ALJs[1] and prohibits substantive review and supervision of an ALJ's performance of his quasi-judicial functions. See 5 U.S.C. § 500, et seq. (1982).[2] This is

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[1] As observed by the Supreme Court in Butz v. Economou, 438 U.S. 478, 513 (1978), "the process of agency adjudication is currently structured so as to assure that the hearing examiner exercises his independent judgement on the evidence before him, free from pressures by the parties or other officials within the agency."

[2] ALJs are exempt from performance appraisals under Chapter 43. 5 U.S.C. § 4301 (1982). ALJ's are independent of investigative or prosecutional personnel in the agency. Id. § 554(d). Periodic step pay increases are given without certification by the employing agency that the ALJ is performing at an acceptable level of competence. Id. § 5335. Once appointed an ALJ is not subject to the usual probationary period for agency employees. Id. § 3321(c). An ALJ can be disqualified from a case only upon petition by either the agency or a private party. Id. § 554(d). Cases are assigned to the ALJs in rotation so far as practicable. Id. § 3105. The ALJs may not perform duties that are inconsistent

not to say that there are prohibitions against appropriate administrative supervision that is required in the course of general office management.[3]

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with their duties as judges. Id. § 3105. The ALJ may issue subpoenas, rule on proffered evidence, and regulate the course of the hearing. Id. § 556(c). See Richardson v. Perales, 402 U.S. 389, 408-10 (1971); United States v. Shaughnessy, 347 U.S. 260, 266-67 (1954). An ALJ may not consult any person or party, including agency officials, concerning a fact at issue in the hearing, unless a notice and an opportunity for all parties to participate is provided. Id. § 554(d)(1). Parties present their case by oral and documentary evidence, id. § 556(d), and the transcript of testimony, exhibits, and pleadings constitute the exclusive record for decision. Id. § 556(e). The ALJs in all their decisions must make findings and conclusions on all issues of fact, law, or discretion presented on the record. Id. § 557(c).

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BUREAU OF HEARINGS AND APPEALS SOCIAL SECURITY ADMINISTRATION

POSITION DESCRIPTION

ADMINISTRATIVE LAW JUDGE (LICENSING AND BENEFITS)

. . .

Federal appellate courts have shed some light as to the proper interpretation of the statutory "good cause" standard and have authorized removals for financial irresponsibility, McEachern v. Macy, 233 F.Supp. 516 (D.S.C. 1964), aff'd, 341

III. SUPERVISION AND GUIDANCE

> The Social Security and Administrative Procedure acts prohibit substantive review and supervision of the administrative law judge in the performance of his quasi-judicial functions. His decisions may not be reviewed before publication, and after publication only by the Appeals Council in certain prescribed circumstances. He is subject only to such administrative supervision as may be required in the course of general office management. His decisions take into account all applicable Federal, State, and foreign laws, statutes, regulations, rulings, and decisions of the Federal courts.

Association of Administrative Law Judges v. Heckler, 594 F.Supp. 1132, 1146 (D.D.C. 1984) (emphasis added).

F.2d 895 (4th Cir. 1965), and physical incapacitation. Benton v. United States, 488 F.2d 1017, 203 Ct. Cl. 895 (Ct. Cl. 1973).

Determining the existence of "good cause" is not a simple task, but a task that is commenced by stating what "good cause" is not. If the agency bases a charge on reasons which constitute an improper interference with the ALJ's performance of his quasi-judicial functions, the charge cannot constitute "good cause." Whether the charge is based on reasons which interfer with with quasi-judicial function is a question of fact and must be answered on a case-by-case basis.

Here, the Board, after a full hearing, determined that the nature of the charge brought against petitioner amounted to his failure to comply with

office administrative procedures. The Board further determined that the procedures did not interfere with the ALJ's decisional independence.

Petitioner contends that the agency failed to prove that the charge did not interfere with his decisional independence. Petitioner further asserts that the burden of proving such interference was erroneously placed on him. On the contrary, petitioner has mischaracterized what actually occurred at his hearing. The burden of proving the charge by a preponderance of the evidence is and remains throughout the proceeding upon the agency. However, "once an agency has made a prima facie showing, the burden of going forward with evidence to rebut that showing necessarily shifts to the employee . . . ." Schapansky v. Dept. of Transportation,

735 F.2d 477, 482 (Fed. Cir.), cert. denied, 105 S.Ct. 432 (1984). "Absent effective rebuttal, the agency must be held to have carried its burden of persuasion." Id. at 483.

Under 5 U.S.C. § 7703(c) (1982) we review this finding and will set it aside only when it can be found to be:

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) obtained without procedures required by law, rule, or regulation having been followed; or

(3) unsupported by substantial evidence.

Here, however, the Board took into account all the facts and circumstances and we find that the record clearly contains substantial evidence to support the finding of no decisional interference. Consolidated Edison Co. v.

National Labor Relations Board, 305 U.S. 197, 229 (1938). We cannot as a matter of law rule that the administrative procedures complained of by petitioner interfere with an ALJ's decisional independence. Therefore, the Board's determination is affirmed.

PENALTY

Petitioner asserts that the penalty imposed for this charge is inappropriate. Deterimination of the appropriate penalty is a matter committed primarily to the agency's discretion. Jones v. United States, 617 F.2d 233, 236, 223 Ct. Cl. 138 (Ct. 1980). We have not required that each and every factor of the twelve Douglas[4] factors be considered. We have only required that the penalty

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4 Douglas v. Veterans Administration, 5 MSPB 313 (1981).

selected be reasonable when considered against the relevant factors. Nagel v. Department of Health and Human Services, 707 F.2d 1384 (Fed. Cir. 1983). Only in the exceptional case in which the penalty exceeds that permitted by statute or regulations or is so harsh that it amounts to an abuse of discretion may its imposition be overturned. Weston v. U.S. Dept. of Housing & Urban Dev., 724 F.2d 943, 949 (Fed. Cir. 1983); accord Miguel v. Dept. of the Army, 727 F.2d 1081 (Fed. Cir. 1984). Petitioner fails to convince us that the Board has not considered the relevant Douglas factors or that the penalty was so grossly disproportionate to the offense as to amount to an abuse of discretion. The imposed penalty is affirmed.

AFFIRMED

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

JERRY G. BRENNAN,	)	
	)	
Petitioner,	)	
	)	
v.	)	Appeal No. 85-2477
	)	
DEPARTMENT OF HEALTH AND HUMAN SERVICES,	)	
	)	
	)	
Respondent.	)	

JUDGMENT

ON APPEAL from the Merit Systems Protection Board in

CASE NO(S). HQ75218210010

This CAUSE having been heard and considered, it is

ORDERED AND ADJUDGED:

AFFIRMED

ENTERED BY ORDER OF THE COURT

DATED: April 3, 1986 /s/ Francis X. Gindhart
Francis X. Gindhart, Clerk

ISSUED AS A MANDATE: June 9, 1986
COSTS: Against, Petitioner
PRINTING ----------$90.08
TOTAL ----------$90.08

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

JERRY G. BRENNAN,	)	
	)	
Petitioner,	)	
	)	
v.	)	Appeal No.
	)	85-2477
DEPARTMENT OF HEALTH AND HUMAN SERVICES,	)	
	)	
	)	
Respondent.	)	

Before MARKEY, Chief Judge, SMITH and BISSELL, Circuit Judges.

O R D E R

A petition for rehearing having been filed in this case,

UPON CONSIDERATION THEREFORE, it is

ORDERED that the petition for rehearing be, and the same hereby is, denied.

The suggestion for rehearing in banc is under consideration.

FOR THE COURT

/s/ Francis X Gindhart
Francis X. Gindhart, Clerk

DATE: 6/2/86

cc: Mr. Glenn W. Denham
Mr. Ronald A. Schechter, DOJ
Mr. Glenn R. Lawrence

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

JERRY G. BRENNAN,	)	
	)	
Petitioner,	)	
	)	
v.	)	Appeal No.
	)	85-2477
DEPARTMENT OF HEALTH AND HUMAN SERVICES,	)	
	)	
	)	
Respondent.	)	

O R D E R

A suggestion for rehearing in banc having been filed in this case,

UPON CONSIDERATION THEREOF, it is

ORDERED that the suggestion for rehearing in banc is declined.

FOR THE COURT

/s/ Francis X. Gindhart
Francis X. Gindhart, Clerk

6/10/86
Date

cc: Mr. Glenn W. Denham
Mr. Ronald A. Schechter, DOJ
Mr. Glenn R. Lawrence

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

SOCIAL SECURITY ADMINISTRATION, DEPARTMENT OF HEALTH AND HUMAN SERVICES	)	
Complainant,	)	Dkt. No. HQ75218-210010
v.	)	Date: 4/15/85
JERRY G. BRENNAN, ADMINISTRATIVE LAW JUDGE,	)	
Respondent.	)	

FINAL DECISION

The Social Security Administration (agency) proposed the removal of respondent Brennan, an administrative law judge assigned to the Office of Hearings and Appeals, based

on two charges.[1] The first charge alleged in substance that respondent's productivity failed to meet a minimally acceptable level because of inefficiency and neglect of duty. The second charge alleged that respondent had "displayed a pattern of disruptive, insubordinate, obstructionist and dilatory conduct in the performance of his official duties."

After a hearing, MSPB Administrative Law Judge Edward J. Reidy issued a Recommended Decision in which he found the agency had proven the first charge and had met its burden of proof on the second charge by establishing most but not all of its specifications. Judge Reidy held that, based

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[1] The agency proposed the removal of respondent under 5 U.S.C. § 7521. Under section 7521 an administrative law judge may be disciplined "only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board."

on "the totality of the circumstances," respondent should be removed from his position as an administrative law judge with the Office of Hearings and Appeals. On exceptions to the Recommended Decision, the Board held that the agency had failed to support the charged failure to meet a minimally acceptable level of productivity. In an Opinion and Order the Board remanded the case for consideration of a number of other questions.

The Board now has before it the Supplemental Recommended Decision and numerous pleadings addressed to that decision.[2] In essence, this

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[2] The parties have filed exceptions and responses to each other's exceptions; the Federal Administrative Law Judges' Conference and the Association of Administrative Law Judges have each filed an amicus brief to which the Social Security Administration has replied.

proceeding has now been reduced to three issues.[3]

Judge Reidy found on those three issues that respondent had notice and was guilty of a charge of insubordination in not replying specifically to an inquiry from the Chief Administrative Law Judge (CALJ) with respect to respondent's declining productivity, that respondent was guilty of disruptive conduct in the office where he was employed, and that respondent was abusive to the Administrative Law Judge in Charge (ALJIC) of the office. Judge Reidy recommended respondent's removal.

We agree with Judge Reidy with respect to respondent's disruptive conduct, but

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[3] In his Supplemental Recommended Decision Judge Reidy ruled adversely to the agency on the matters concerning respondent's productivity, timeliness, and workload specified under Charge II. The Board adopts these rulings as consistent with the rulings in SSA v. Goodman, MSPB Docket No. HQ75218210015 (Feb. 6, 1984). See Supp. R.D. at 11-12.

disagree on the other issues. We believe that a penalty of a 60-day suspension is appropriate under the circumstances of record. Each issue and our choice of penalty will be considered in turn.

I

The first issue on remand is whether specification 6 of Charge I gave respondent sufficient notice that in addition to an unacceptable level of productivity, he was being separately charged with insubordination.[4]

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[4] Charge I stated:

> During calendar year 1981, Mr. Brennan's productivity has been unacceptably low. He has failed to maintain his output at a minimally acceptable level of efficiency despite admonitions that he improve his performance. This inefficiency and neglect of duty is detrimental to the efficiency of the service.

Specification 6 under Charge I read:

In his Recommended Decision, Judge Reidy found there were two generic charges against respondent. R.D. at 11-12 and 25. He stated that the first charge, concerning productivity and neglect of duty, was supported by, among others, specification 6. R.D. at 11-12. He did not treat specification 6 as a separate charge.

The Chief Administrative Law Judge, Phillip T. Brown, forwarded a memorandum to Mr. Brennan on November 9, 1981 expressing dissatisfaction with Mr. Brennan's unacceptable performance of his assigned duties and directing him to provide an explanation for his apparent neglect of duty. Mr. Brennan responded on November 20 that he was astounded that Mr. Brown was unfamiliar with the complaints of mismanagement which Mr. Brennan contended were the cause of the low productivity. He forwarded a collection of critical memoranda and other writings but he did not explain specifically why he was unable to schedule and hear more cases.

In his Recommended Decision Judge Reidy found that respondent had failed to respond fully to CALJ Brown's memorandum and that respondent's answer "disclosed an attitude of deliberate disrespect toward that official." R.D. at 17. Judge Reidy noted that, in referring to CALJ Brown's warning that failure to reply would be considered insubordination, respondent stated he was not aware his position was one of subordination. R.D. at 16. Judge Reidy did not make a finding under Charge I that respondent was "insubordinate." He referred to insubordination specifically as an element of Charge II. R.D. at 25.

In its Opinion and Order remanding the proceeding, the Board raised the question whether insubordination was an allegation under Charge I and whether respondent had sufficient notice that insubordination would

be considered a separate charge. O. & O. at 7. The Board's intent was not to generate a charge that had not previously been raised, but rather, if respondent was to be found guilty of insubordination under Charge I, to assure that respondent was made aware of such a charge during the hearing in order to satisfy the requirements of due process.

Judge Reidy found in the Supplemental Recommended Decision that respondent had notice of a separate charge and that the agency proved the charge. Our examination of the record, including Judge Reidy's Recommended Decision as well as his Supplemental Recommended Decision, leads us to a contrary conclusion with respect to notice.

Specification 6 alleged that respondent failed to reply specifically to CALJ Brown's memorandum directing respondent to provide an

explanation about his apparent neglect of duty.[5]

Judge Reidy's finding of notice is based on respondent's direct testimony explaining the memorandum he wrote in response to CALJ Brown's memorandum expressing dissatisfaction with respondent's work and stating that a "failure to respond" would be considered

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[5] Respondent replied with a one-page memorandum that was accompanied by some 150 pages of the attachments. Although the entire package may have been intended to be offered into evidence, only the cover memorandum was copied and mailed to Judge Reidy for inclusion in the record. The record shows that any material to be included in the hearing record that was not submitted within three days of the close of the hearing would be automatically rejected. Transcript (Tr.) Vol. I 120; V 138-19. Judge Reidy did not have the material before him at the time he issued his Recommended Decision and his Supplemental Recommended Decision. Not until he filed his exceptions to the Supplemental Recommended Decision did respondent move to admit the attachments on the ground that they were mistakenly omitted from the hearing record. The motion is denied. The attachments are proferred for inclusion in the record out of time.

insubordination. Respondent admitted that in his memorandum he stated that he was astonished "to be threatened with a charge of insubordination" because he was not aware that an administrative law judge was in a subordinate position. Judge Reidy considered this evidence that respondent knew specification 6 was a charge of insubordination and defended against it. We disagree.

Respondent did no more than express awareness of a threat of a charge of insubordination if he failed to reply, not that specification 6 charged him with insubordination. Because he had replied, he could have considered the threat of a charge of insubordination abated.

Moreover, during the course of the hearing Judge Reidy several times spoke in terms that suggested only two charges, productivity and disruptive behavior, were

before him. Tr. I 11, 13, 15, 23. In addition, CALJ Brown, who had recommended that charges be brought, viewed the complaint as based on only two charges: low productivity and conduct relating to other employees in respondent's office. Tr. IV 11-12.

The Board concludes that respondent did not have fair notice that specification 6 in Charge I was a separate charge of insubordination or what a purported charge of insubordination would have entailed. To find respondent guilty of any kind of insubordination based on specification 6 would deny him due process.

II

The second issue on remand required an analysis of respondent's defense to the specification in Charge II that he was unwilling to adapt to the new organizational structure which realigned support personnel

of the office where he was employed and that his lack of cooperation seriously disrupted office operations. O. & O. at 6-7.

The Board cited its decision in SSA v. Manion, MSPB Docket No. HQ7521820008 (Feb. 6, 1984) to the effect that instructions to an administrative law judge that do not constitute improper interference with the performance of his adjudicative functions are not forbidden and his failure to comply may constitute good cause for discipline. O. & O. at 7. If, however, the respondent administrative law judge shows that the instructions would impede his adjudicative functions, noncompliance with the instructions cannot constitute good cause. Id.

The Board found that respondent's conduct had been proven disruptive and directed that the proved specification "should be analyzed in order to determine if

the manner in which the agency was attempting to meet its proven need for greater productivity improperly interferred with respondent's ability to hold full and fair hearings and render complete and reasoned decisions." O. & O. at 6-7. Respondent's success in this defense would preclude a finding of good cause for discipline.

Respondent's defenses were that (1) the evidence to support the specification is primarily that of hostile witnesses, (2) his personal preferences in procedures are arguably within the zone of his judicial independence, and (3) the specification offended his constitutional rights under the First Amendment.

The evidence to support this specification was the testimony of support personnel who recounted their personal experiences in dealing with respondent. Tr. IV 35-39, 61-75, 109-111, 114-117, 120-121;

see CX-3 and CX-4.[6] Respondent's claim that the witnesses were "hostile" is nothing more than an assertion that their testimony was adverse to him. Judge Reidy observed them and found their testimony credible. When questions of credibility are raised, due deference must be given to the assessment of the presiding official. Weaver v. Department of the Navy, 2 msPB 297, 299 (1980), aff'd No. 80-7316 (9th Cir. 1982).

According to the testimony, respondent insisted that all mail on his cases be delivered first to him. This prevented the support staff from determining whether necessary steps in processing a case had been accomplished or whether it was necessary and appropriate for them to initiate other or exceptional actions. They were unable to report on the status of a case to interested

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[6] CX refers to Complainant's Exhibit.

parties and for valid managerial planning purposes. Witnesses testified that respondent actively resisted using the standard worksheets and documenting case processing, with similar disruptive effects. This conduct continued over at least a substantial part of 1981, the period to which the complaint was limited.

Respondent's contention that his personal preference in these matters is "arguably" within the zone of his decision independence is hollow. His own testimony clearly establishes that he would not cooperate he preferred to do things his own way. Tr. V 34-35, 43-45; IV 111. The Board agrees with Judge Reidy that respondent utterly fails to show that the office procedures were unreasonable or that if respondent had adhered to them he would have been unable to give full and fair hearings to complainants or to render impartial and

independent decisions.

Nor can respondent successfully claim his disruptive conduct was protected expression under the First Amendment. The record here presents clear and uncontradictory evidence that respondent knew the purpose of the changes within the hearing office where he was employed and the procedures whereby they would be effectuated. He himself characterized his behavioral response as expressing a difference in approach to office procedures. The situation presented by respondent's reactions is not unlike that in Foster v. Ripley, 645 F.2d 1142 (D.C. Cir. 1981). In that case the court held that the internal reorganization of the Library of Congress was a matter of little public interest and concern in the context of the First Amendment. In particular, the court held: ". . . Foster was not speaking out on

issues of general public concern, . . . [he] was merely airing an internal dispute over the extent of his supervisory powers." 645 F.2d at 1149. The conclusion is inescapable on this record that the office situation here was not a matter of public concern. See Connick v. Myers, 103 S.Ct. 1684 (1983). Respondent's disruptive conduct was an expression of his personal dissatisfaction and enjoys no constitutional protection.

The respondent has failed in his defenses. We find his disruptive conduct good cause for discipline.

III

The third issue still before the Board concerns the specification in support of Charge II that respondent was personnally abusive to the ALJIC of the office where respondent worked. Judge Reidy found this allegation proven and found that the personal abuse of the ALJIC constituted good cause for

discipline.

The alleged personal abuse arose from a memorandum written to the ALJIC by respondent. The memorandum is not in the record. Respondent admitted during his testimony, however, that he wrote a memorandum to the ALJIC commenting that the ALJIC was not properly handling his own cases and that he controlled his staff by improper authorization of overtime and promotions. Tr. V 65, 66.

In its Opinion and Order remanding this proceeding the Board noted that disrespectful comments by a subordinate may support an adverse action under the efficiency of the service standard because disrespect disrupts the supervisory relationship. The Board asked for a determination as to whether similar comments made by an ALJ to an ALJIC should constitute good cause under section 7521. The Board stated that the form,

manner, and content of respondent's memorandum to the ALJIC were relevant and expressed the need for an analysis of the effect of the memorandum on the professional relationship between an ALJ and an ALJIC. O. & O. at 8.

In this instance, so far as the record shows, the critical comments were directed to the ALJIC only; they occurred in a single memorandum; they were not disseminated elsewhere, either within or without the office; they were not expressed in abusive or threatening language.[7]

Assuming, without deciding, that the comments enjoyed no Constitutional protection under the First Amendment, we must nevertheless find against the agency. The ALJIC testified that he considered the

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[7] Whether the criticisms would support an action for defamation is not pertinent to a resolution of this proceeding.

comments abusive and demeaning. Tr. I 85-86. He did not testify to what, if any, effect the comments might have had on his professional relationship with the respondent or with the administrative prerogatives the ALJIC exercised over members of the support staff or other ALJs. Although the comments were made during the period of respondent's disruptive conduct, the ALJIC did not testify that he considered his administrative authority affected in any way by the respondent's remarks.

Those situations in which a subordinate shows disrespect to a supervisor affect the relationship because of the close association between supervisor and subordinate and the need for the supervisor to have confidence in and loyalty from the subordinate in the performance of his duties. Disrespectful comments by a subordinate to a supervisor may be caused for discipline because of the

effect such comments are considered to have on the efficiency of the service.[8] The Board has observed that insolent disrepect toward supervisors so seriously undermine the capacity of management to maintain employee efficiency and discipline that it goes to the heart of the efficiency of the service. Jefferson v. Veterans Administration, 6 MSPB 297 (1981).

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[8] In appeals decisions under the efficiency of the service standard, the Board has distinguished merely critical comments from loud, abusive, threatening, obscene, or sexually suggestive comments. Compare Wheat v. Veterans Administration, MSPB Docket No. AT07528210515 (May 25, 1984) (appellant's telling his supervisor that he was not insulting or insubordinate) with Muldrow v. Veterans Administration, MSPB Docket No. SL07528410144 (Aug. 21, 1984) (shouting and making sexually suggestive and threatening comments was insubordinate) and Hemelt v. Veterans Administration, MSPB Docket No. DA0752810639 (June 1, 1984) (use of insulting, abusive, and obscene language was insubordinate).

Unlike those situations, the ALJ and the ALJIC perform their adjudicatory functions independently of each other. The ALJIC's performance of his limited administrative functions within the office does not require the personal loyalty of respondent or entail a professional relationship that would be damaged by respondent's critical comments. Nor is the efficiency of the service the standard in disciplining an ALJ. Social Security Administration v. Glover, 23 M.S.P.R. 57 (1984).

In the case of an ALJIC and ALJ, whether disrespectful comments would impair the relationship is a matter of proof. Considering the largely independent performance of their duties, the limited administrative function of an ALJIC, the circumstances of respondent's comments here and the lack of any evidence of an adverse affect on the relationship resulting from

these comments, we find that the agency has failed to establish the critical memorandum as good cause for discipline.[9]

IV

Judge Reidy recommends respondent's removal after finding that respondent had been insubordinate to the CALJ, had engaged in disruptive conduct in the office, and had been abusive to the ALJIC. We have found only one cause for discipline by a preponderance of the evidence; that is, respondent engaged in conduct that was disruptive to the office where he worked.

In an original jurisdiction case, where

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[9] Cf. Social Security Administration v. Glover, 23 M.S.P.R. (1984). The Board held that the single private use of a vulgar epithet by an ALJ to an ALJIC who was trying to resolve an administrative matter was not serious in the context of the case. Nevertheless, the Board considered it misconduct to be considered with more serious misconduct in assessing the penalty.

the Board is the first entity to consider the evidence of the charged conduct as well as any mitigating factors, the choice of the penalty is for the Board. Social Security Administration v. Glover, 23 M.S.P.R. at 78-79 (1984). The Board has adopted for guidance in assessing a penalty in an original jurisdiction case, the same standards required of an agency in an appellate case. Id. Thus, the Board will examine the record in this case with a view to balancing the relevant factors suggested in Douglas v. Veterans Administration, 5 MSPB 313 (1981).

The respondent's disruption of the office is serious. It continued throughout a substantial portion of 1981. Respondent holds the position of administrative law judge, a position of prominence, whose incumbents usually engender great respect and whose cooperation within the office should be

taken for granted. We note that respondent has served as an administrative law judge for some nine years without incident and during the time in question here was experiencing some nagging physical ailments. Considering these factors, the Board believes that a penalty of a 60-day suspension without pay is reasonable.

Accordingly, the Board AUTHORIZES the Social Secutiry Administration of the Department of Health and Human Services to suspend Administrative Law Judge Brennan for a period of up to 60 days. Respondent has the right to seek judicial review as provided in 5 U.S.C. § 7703.

FOR THE BOARD:

/s/ Robert E. Taylor
Robert E. Taylor
Clerk of the Board

Washington, D.C.

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

SOCIAL SECURITY ADMINISTRATION, DEPARTMENT OF HEALTH AND HUMAN SERVICES,	)	
Complainant,	)	Dkt. No. HQ75218-20010
v.	)	DATE: 2/6/84
JERRY G. BRENNAN ADMINISTRATIVE LAW JUDGE,	)	
Respondent.	)	SLIP OPINION

OPINION AND ORDER

The Social Security Administration (agency) has proposed the removal of respondent Brennan, an administrative law judge assigned to the Office of Hearings and Appeals, based on two charges. The first charge alleged that respondent's productivity failed to meet a minimally acceptable level in calendar year 1981. The second charge alleged that respondent had "displayed a patter of disruptive, insubordinate,

obstructionist and dilatory conduct in the performance of his official duties."

Under 5 U.S.C. § 7521, an administrative law judge may be disciplined "only for good cause established and determined by the Merits Systems Protection Board on the record after opportunity for hearing before the Board." Respondent was afforded a hearing, at which he was represented by counsel, before MSPB Administrative Law Judge Edward J. Reidy. He found the agency had proven the first charge and had met its burden of proof on the second charge by establishing most but not all of its six specifications. Judge Reidy held that, based on "the totality of the circumstances," respondent should be removed from his position as an administrative law judge with the Office of Hearings and Appeals.

Respondent has filed exceptions pro se to Recommended Decision.[1]

CHARGE I

Respondent contends in his exceptions that the agency cannot institute a disciplinary action against an administrative law judge for poor performance. In Social Security Administration v. Goodman, MSPB Docket No. HQ7521820015, decided this date, the Board thoroughly analyzed the legal arguments against an agency's initiation of such actions and concluded that performance-based actions are not precluded as a matter of law. Here, the agency has alleged that respondent's low productivity is sufficiently poor performance to warrant his removal. It has attempted to establish unacceptably low productivity primarily through a comparison

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[1] Respondent also requested an oral argument and that request is hereby denied.

of the respondent's case disposition statistics with the average case disposition rate of its approximately 800 ALJs.[2] This evidence is substantially identical to the evidence introduced in Goodman which we found to be inadequate.

The evidence did establish that respondent's disposition were less than half of the nationwide average during 1981. However, the national average included different types of dispositions, such as dismissals, short form reversals, and affirmances both on the written record and after a hearing. No evidence was introduced by the agency to support a conclusion that its statistical evidence relating to

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[2] In answering respondent's interrogatories, the agency defined unacceptably low performance as a case disposition rate which was "not within the range of the average productivity of all ALJs employed by the agency." (Administrative Record, Tab 34).

disparate items could be validly used to establish either a level of reasonable productivity or a measure against which respondent's productivity could meaningfully be compared.[3] Where the agency's proof of unacceptably low productivity rests almost entirely upon statistical evidence, we will not find proof of good cause unless it is established that the statistics validly measure comparative productivity. Since that has not been established in this case, we find that the agency has not proven that respondent's productivity was unacceptably low.

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[3] The Recommended Decision did hold that the cases assigned respondent "paralleled those assigned other ALJs." If that were so, then the nationwide average could provide a guide for measuring reasonable productivity. However, no evidence was in fact introduced which indicated that the mix of respondent's cases mirrored those contained in the national average.

We note however that Charge I included a specification which might have formed the basis for a separate insubordination charge. Specification 6 provided:

> The Chief Administrative Law Judge [CALJ], Philip T. Brown, forwarded a memorandum to Mr. Brennan on November 9, 1981 expressing dissatisfaction with Mr. Brennan's unacceptable performance of his assigned duties and directing him to provide an explanation for his apparent neglect of duties. Mr. Brennan responded on November 20, that he was astounded that Mr. Brown was unfamiliar with the complaints of mismanagement which Mr. Brennan contended were the cause of the low productivity. He forwarded a collection of critical memoranda and other writings but he did not explain specifically why he was unable to schedule and hear more cases.

The memorandum of the CALJ referred to in that specification (Agency Ex. 11) concluded with the statement that a failure to respond would be regarded as insubordination, and the Recommended Decision found that the respondent's

incomplete response disclosed a disrespectful attitude toward a supervisory official.

Since we are returning this case for a supplemental Recommended Decision with regard to Charge II, the issue of whether specification 6 of Charge I constitutes the basis for a severable charge should also be considered on remand. In that regard, the administrative law judge should determine if the specification's placement, at the end of a performance-based charge relating to low productivity, failed to properly afford the respondent sufficient notice to prepare and present an appropriate defense to an insubordination allegation.

CHARGE II

The Recommended Decision found the agency had proven the second charge by preponderant evidence on three specifications and a portion of a fourth specification out of a total of six. The Recommended Decision also found there was a rational nexus between the proven specifications and the efficiency of the service. Moreover, it concluded that proof of this charge, in conjunction with proof of the first charge, formed an appropriate basis for recommending respondent's removal.

In addition to not adopting the Recommended Decision finding on Charge I, we have today held in Goodman that it is not appropriate to use the efficiency of the service standard to determine whether good cause has been established under 5 U.S.C. § 7521. The standards

are distinct and different. While traditional adverse action cases may provide guidance in deciding section 7521 cases, the efficiency of the service standard is not imputed into the good cause standard. Because of our finding on Charge I and because of our above-described holding, we are remanding this matter for a supplemental Recommended Decision. The Administrative Law Judge who heard the evidence in this five-day hearing should be afforded the opportunity to determine if the proven allegations established good cause under section 7521 to discipline respondent and, if so, whether, in light of our holding with regard to Charge I, they warrant removal or the imposition of some lesser penalty.

The supplemental Recommended Decision should set out the evidence supporting the Administrative Law Judge's determinations with regard to specifications 1 and 2. The first specification alleges that respondent failed to request, maintain and schedule an adequate docket of cases comparable to those of coworkers. The second specification alleges that respondent failed to dispose of the cases assigned to him in a timely manner. The supplemental Recommended Decision should identify the evidence which forms the basis for the determinations regarding adequacy, comparability and untimeliness. Material evidence on these issues should be described, conflicting evidence should be assessed and weighed and , if necessary, disputed

facts should be resolved by credibility findings.

Respondent's defense to the third proven specification should be treated similarly. This specification alleged that respondent unreasonably refused to follow established office routine and standard procedures which had been implemented in his office to allow for fuller staff utilization. In order to increase productivity and in accordance with the suggestions from agency management, the organizational structure of respondent's office had been changed. Previously, a specific support staff unit had been assigned to each administrative law judge. Under the new "reconfigured" structure, these specific assignments were abolished and the support staff was divided into

functional units which serviced all of the offices' administrative law judges.

Respondent was unwilling to adapt to this new structure and his lack of cooperation seriously disrupted office operations. As we hold today in Social Security Administration v. Manion, MSPB Docket No. HQ 75218210008, instructions which do not constitute an improper interference with the performance of an ALJ's judicial junctions are not prohibited.

An ALJ's independence is qualified. It does not provide immunity from appropriate supervision. Where a management need exists to impose reasonable requirements which would not affect an ALJ's ability to provide full and fair hearings and to render impartial and complete decisions, an ALJ would not be justified in refusing to

comply with such instructions. Respondent's defense to the third specification should be analyzed in order to determine if the manner in which the agency was attempting to meet its proven need for greater productivity improperly interfered with respondent's ability to hold full and fair hearings and render complete and reasoned decisions.

Finally, the Board is particularly interested in the analysis, on remand, of the relationship between allegations in the fourth proven specification and the good cause standard. That specification alleged that respondent was personally abusive to the Administrative Law Judge in Charge (ALJIC) of the office. Specifically, respondent asserted that the ALJIC was not properly handling his own cases and

that the ALJIC controlled his staff by improper authorization of such things as overtime and promotions. Disrespectful comments may form the basis for an adverse action against a subordinate under the efficiency of the service standard because they disrupt a supervisory relationship. In determining whether similar comments made by an administrative law judge should constitute good cause under section 7521, the supplemental Recommended Decision should discuss the form, manner, and context of respondent's statements and analyze their effect on the professional relationship which exists between an ALJIC and an administrative law judge.

This proceeding is REMANDED to the presideing Administrative Law Judge for preparation and issuance of a

supplemental Recommended Decision in accordance with the Opinion and Order. Within 35 days of its issuance, the parties may file briefs with the presiding Administrative Law Judge, based on the evidence introduced prior to the close of the hearing record, which address any issued raised by the Opinion and Order.

SOR ORDERED.

Hubert E. ELlingwood

Maria L. Johnson

Slip Opinion

Dennis M. Devaney

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

SOCIAL SECURITY ADMINISTRATION, DEPARTMENT OF HEALTH AND HUMAN SERVICES,	)	
Complainant,	)	Dkt. No. HQ75218-20010
v.	)	DATE: 3/14/84
JERRY G. BRENNAN ADMINISTRATIVE LAW JUDGE,	)	
Respondent.	)	SLIP OPINION

OPINION AND ORDER

The Board issued an Opinion and Order in this proceeding on February 6, 1984, remanding the case for issuance of a supplemental recommended decision in accordance with the Opinion and Order. The Agency has now requested clarification of the Board's instructions to the parties on remand.

As here pertinent, the Board's Opinion and Order provided that within 35

days of its issuance, the parties might file briefs with the presiding administrative law judge which address any issue raised in the Opinion and Order.[1] The agency has misinterpreted these instructions.

The agency has read the instructions to provide for filing of briefs with the presiding administrative law judge 35 days after issuance of the supplemental decision. The purpose of providing the parties the opportunity to file briefs with the administrative law judge is to give him the benefit of their arguments prior to the issuance of his supplemental decision. Once he issues his decision, filing briefs with him would serve no purpose.

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[1] The Board limited the briefs to the evidence of record.

The agency then requests that if it has misinterpreted the Board's Opinion and Order, the Board grant additional time to file a brief with the administrative law judge. The novel issues which the Board addressed in its Opinion and Order for consideration in the supplemental recommended decision require that the administrative law judge have the benefit of the agency's brief.

Accordingly, the time for filing briefs with the presiding administrative law judge is EXTENDED for both parties until 35 days from issuance of this order.

SO ORDERED.

Transcript Vol. V at pp. 24-28,

testimony of Jerry G. Brennan:

> Judge Rowlett imposed a reconfigured office setup of his own when he first arrived in January of 1981. . . . The essential thing that Judge Rowlett did when he arrived that was very disturbing at least to me was the fact that while he nominally left a so-called unit system, he did not provide the means that we could govern, or control, or direct the units. All people -- all personnel were assigned to him in a pool. And out of our units he would, and could then use these people like hardware so to speak fitting them in as he rightfully saw fit, but the unit system no longer existed which we were accustomed to, and we would never know from -- When I say "we" judge, I mean "me," I'm sorry. I would never know from one day to the next whether I would have a person available to do something, or whether that person would be assigned to duty for another judge, or to Judge Rowlett, or to another duty in what he called the administrative group. He has various groups, committee type groups, each within his own administrative unit, and it was extremely complex and carefully worked out. But I had no pre-warning for example whether I would have someone working for me on one

particular day of not, or whether that person might be pulled off of something to do something else. And they were all assigned to one judge, Judge Rowlett, who rated them. And we, without the privilege or rating the employees creates quite a problem, because we are accepting the responsibility of directing them, and guiding them, without the ability to do anything about it, and naturally the employees are well-aware of this judge, that was the basic problem.

. . . .

Q. I am asking you to take as long as necessary to make the facts clear to us. Now when you first came back before Judge Rowlett took charge in January of '81, you referred to having had a unit system?

A. Yes, I've always had a unit system.

Q. And that was a system under which you had certain individuals who were support staff assigned to you individually?

A. Right.

Q. And you rated them?

A. Worked for us alone, and we rated them alone. Well, I say "alone," the ALJIC would have the right to change the ratings.

Q. But in other words, if you had a hearing assistant assigned to you, she knew that if you thought she did a good job, she might get a higher rating from you, and if you thought she didn't do a good job, she might get a lower rating from you, is that what you're saying?

A. Absolutely, yes sir.

5 U.S.C. 7521

§ 7521. Actions against administrative law judges

(a) An action may be taken against an administrative law judge appointed under section 3105 of this title by the agency in which the administrative law judge is employed only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board.

(b) The actions by this section are --

(1) a removal;

(2) a suspension;

(3) a reduction in grade;

(4) a reduction in pay; and

(5) a furlough of 30 days or less;

but do not include --

(A) a suspension or removal under section 7532 of this title;

(B) a reduction-in-force action under sectin 3502 of this title; or

(C) any action initiated under section 1206 of this title.

5 U.S.C. 556

§ 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision

(a) This section applies, according the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.

(b) There shall preside at the taking of evidence --

(1) the agency;

(2) one or more members of the body which comprises the agency; or

(3) one or more administrative law judges appointed under section 3105 of this title.

(c) Subject to published rules of the agency and within its powers, employees presiding at hearings may --

(1) administer oaths and affirmations;

(2) issue subpoenas authorized by law;

(3) rule on offers of proof and receive relevant evidence;

(4) take depositions or have depositions taken when the ends of justice would be served;

(5) regulate the course of the hearing;

(6) hold conferences for the settlement or simplification of the issues by consent of the parties.

(7) dispose of procedural requests or similar matters;

(8) make or recommend decisions in accordance with section 557 of this title; and

(9) take other action authorized by agency rule consistent with this subchapter.

BEST AVAILABLE COPY

The Federal Administrative Law Judges Conference

424 NATIONAL LAWYERS CLUB
1815 H STREET, N. W.
WASHINGTON, D. C. 20006

The Federal Administrative Law Judges Conference (FALJC was established in 1947 as the "Federal Trial Examiners Conference." The Conference has approximately 764 members, representing judges from virtually every federal administrative agency and department. Under its constitution and by-laws, FALJC exists "to foster faithful, efficient, and effective performance of the functions assigned to Administrative Law Judges under the various statutes governing Federal administrative proceedings" and "to advance the professional standing, education and welfare of the Administrative Law Judges employed by the Government of the United States.

The attached resolution was passed by the Executive Committee of FALJC on April 25, 1986.

/s/ Paul H. Teitler
Paul H. Teitler
Secretary

April 25, 1986

RESOLUTION

WHEREAS:

1. The Social Security Act contemplates that decisions by administrative law judges in disability cases will be individualized determinations based on evidence adduced at hearings regulated and controlled by the judge.

2. The Administrative Procedure Act and the decisions of the courts contemplate a hearing and proceeding controlled by the judge from the time a case is assigned until an initial decision is issued.

3. The Supreme Court has held that administrative law judges have an obligation in a case where a claimant is unrepresented by counsel to inform themselves of facts relevant of their decisions and to learn the claimant's own version of those facts.

4. The aforesaid "duty of inquiry" derives from the claimants' basic statutory and constitutional right to due procedd in the adjudication of their claims, including a de novo hearing.

5. The duties and obligations of an administrative law judge are "functionally comparable" to that of all other federal judges.

6. Administrative law judges are, under the decisions of the Congress and the Supreme Court, required to hear and decide cases coming before them in accordance with their own understanding and conscience.

7. Congress has repeatedly rejected the establishment of quotas and mandatory deadlines in the processing of disability cases.

8. Congress has recognized that the time needed to make well-reasoned, sound, quality-crafted hearing decisions takes precedence over any policy designed to encourage the mass production of decisions.

9. In 1980 Congress amended § 405(b) of Title 42 to require that every initial determination of ineligibility contain an easily understandable discussion of evidence and reasons for a disability determination.

10. Congress has expressed concern that undue emphasis on the mass production of decisions has produced a marked loss of quality and uniformity in the agency decisions.

11. The Supreme Court has found that administrative law judges should be afforded sufficient time to deliberate to ensure accurate decisions, and to schedule new consultative exams if additional evidence is required.

12. Frank V. Smith, III, Associate Commissioner, Office of Hearings and Appeals, Social Security Administration, has established a concept known as the "reconfiguration" policy (also known as "functional teaming," "field office organizational structure," or "model hearing office" policy).

13. The aforesaid "reconfiguration" policy removes from administrative law judges supervision and control over their support staff, i.e., (1) hearing clerks, (2) hearing assistants, and (3) legal assistants, and places responsibility for their selection and performance in non-judicial managers.

14. The replacement of the staff's individual accountability to the judge is designed to ensure the mass production of decisions to meet management quotas.

15. The establishment of production quotas for staff attorneys and lay assistants and the setting of a minimum of cases to be heard on trips away from the hearing

office interferes with the conscientious exercise of judges' responsibilities.

16. The setting of numerical quotas on support staff pressures judges to meet quotas established by management without regard to the differences in individual cases.

17. By his policy memoranda of November 20 and December 21, 1984, the Associate Commissioner of OHA, SSA has established a program that tends to vitiate the ability of administrative law judges to make independent decisions.

18. The "reconfiguration" policy impedes the decisional automony and functional independence of administrative law judges, as well as the due process right of claimants to receive individualized, well-reasoned, sound, quality-crafted decisions.

THEREFORE IT IS NOW HEREBY RESOLVED: that the President of the Federal Administrative Law Judges Conference communicate to Frank V. Smith, III, Associate Commissioner, Office of Hearings and Appeals, Social Security Administration our deep concern that the policy of reconfiguration interferes with the decisional independence of administrative law judges and the due process rights of Social

Security claimants, tax payers and others interested in a fair hearing.

AND BE IT FURTHER RESOLVED, that the President ofthe Conference communicate the views of the Conference to appropriate officials in the legislative and executive branches of the government and other interested persons.

86-370

Supreme Court, U.S.
FILED
SEP 12 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-307

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

JERRY G. BRENNAN,

Petitioner,

v.

DEPARTMENT OF HEALTH AND
HUMAN SERVICES,

Respondent,

SUPPLEMENTAL BRIEF OF PETITIONER

JUDGE JERRY G. BRENNAN
Box 1355
Middlesboro, KY 40965

Petitioner
Pro Se

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Respondent,

SUPPLEMENTAL BRIEF OF PETITIONER

On September 5, 1986, I filed a pro se petition for writ of certiorari to the United States Circuit Court of Appeals for the Federal Circuit. The Clerk of Court accepted the petition but questioned whether the petition was filed in time and asked for this supplemental brief.

On April 3, 1986, the court of appeals issued its opinion and judgment from which

I have filed a writ of certiorari. On April 17, 1986, I filed a timely petition for rehearing and suggestion for rehearing en banc. On June 2, 1986, the court denied the petition for rehearing. On June 10, 1986, the court declined the suggestion for rehearing en banc.

A petition for writ of certiorari in a civil action must be filed within ninety days after entry of the judgment or decree. 28 U.S.C. § 2101(c). The time for filing the petition for writ of certiorari runs from the date the judgment or decree sought to be reviewed is rendered. Sup. Ct. R. 20.4. However, if a petition for rehearing is timely filed, the time for filing the petition for writ of certiorari runs from the date of the denial of rehearing. Ibid. Before it became a rule of the Court, this was "a traditional and virtually unquestioned practice." United States v. Healy, 376 U.S. 75, 79 (1964)

(Harlan, J.). "It would be senseless for this Court to pass on an issue while a motion for rehearing is pending below . . . ." Id. at 80.

A timely filed petition for rehearing en banc also extends the time for filing a petition for certiorari. Id. at 78.[1] It would be equally senseless for this Court to require that a petition for a writ of certiorari must be filed while a suggestion for rehearing en banc is pending below, with jurisdiction[2] over the merits in both

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[1] See the Court's reference, 376 U.S. at 78, to Panico v. United States, 375 U.S. 29, where a petition for rehearing en banc tolled the time for filing a petition for certiorari, and Genovese v. United States, 375 U.S. 32, where a petition for rehearing and rehearing en banc extended the time.

[2] Until the court of appeals decides the suggestion for rehearing en banc, the "entertaining of the petition keeps the court's jurisdiction alive . . . ." Aspen Mining & Smelting Co. v. Billings, 150 U.S. 31, 37 (1893).

courts, which "could, in some cases, impose an added and unnecessary burden of adjudication upon this court." Id. at 80.

CONCLUSION

Since United States v. Healy clearly controls, and no rule of this Court states to the contrary,[3] the time for filing the

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[3] Rule 35 of the Federal Rules of Appellate Procedure states that: "The pendency of [a suggestion for rehearing en banc] shall not affect the finality of the judgment of the court of appeals . . . ." Rule 1 of those rules states, however, that: "These rules govern procedure in appeals to United States courts of appeals . . . ." It is submitted, in equity, that those rules should not govern procedure for writs filed in this Court.

Petitions for rehearing come from the equity courts. Morse v. United States, 270 U.S. 151, 153 (1926). Equity has been "regarded as an appanage of the Crown's prerogative." 2 Moore, Federal Practice, (2d ed. 1980), p. 2-8 n. 12. It would be anamolous indeed to deny equity to a petitioner challenging the Crown's prerogative, following the glorious path set by Sir Edward Coke. See Bowen, The Lion and Throne.

petition for writ of certiorari started running on June 10, 1986, when the court denied the suggestion for rehearing en banc. The petition for writ of certiorari was, therefore, timely filed.

Respectfully submitted,

JERRY G. BRENNAN, pro se

Dated: September 11, 1986

Supreme Court, U.S.
FILED
OCT 31 1986
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 86-370

In the Supreme Court of the United States

OCTOBER TERM, 1986

JERRY G. BRENNAN, PETITIONER

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D. C. 20530
(202) 633-2217

App

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-370

JERRY G. BRENNAN, PETITIONER

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The court of appeals in this civil case affirmed the judgment of the district court on April 3, 1986 (Pet. App. 18a). A timely petition for rehearing was denied on June 2, 1986 (Pet. App. 19a). Petitioner did not obtain an extension of time within which to file a petition for a writ of certiorari. The time for filing a petition accordingly expired on September 2, 1986, a Tuesday following a federal legal holiday. See 28 U.S.C. 2101(c). The petition was not filed until September 5, 1986. The petition, which was filed pro se, was not accompanied by a notarized statement by a member of the Bar of this Court stating that the mailing took place on a particular date within the permitted time. See this Court's Rule 28.2. The petition is therefore out of time. The time limit provided by Section 2101(c) is jurisdictional. *Department of Banking* v. *Pink*, 317 U.S. 264 (1942).

In his supplemental brief (at 2), petitioner asserts that the petition is nevertheless timely because it was filed within 90 days of June 10, 1986, the date on which the court of appeals denied his suggestion for rehearing en banc. See Pet. App. 20a. This assertion is altogether meritless. By its terms, Rule 20.4 extends the time to petition for certiorari only by the additional time required to decide a "petition for rehearing." The Rule does not provide a similar extension for the disposition of a suggestion for rehearing en banc. Indeed, the rationale underlying Rule 20.4 is that "[a] timely petition for rehearing tolls the running of the three-month period because it operates to suspend the finality of the [lower] court's judgment, pending the court's further determination whether the judgment should be modified so as to alter its adjudication of the rights of the parties." *Department of Banking* v. *Pink*, 317 U.S. at 266. Accord *United States* v. *Dieter*, 429 U.S. 6, 8-9 (1976); *United States* v. *Healy*, 376 U.S. 75, 77-80 (1964). But Fed. R. App. P. 35(c) states plainly that "[t]he pendency of * * * a suggestion [for rehearing en banc] whether or not included in a petition for rehearing shall not affect the finality of the judgment of the court of appeals or stay the issuance of the mandate." Accordingly, unlike a petition for rehearing, a suggestion for rehearing en banc does not affect the finality of the judgment and thus cannot extend the time to petition for a writ of certiorari. Accord, R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 312-314 (6th ed. 1986).[1] Petitioner's time to seek certiorari thus ran from June 2, 1986, the date on which his petition for rehearing was denied.

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[1]Petitioner errs in relying (Supp. Br. 3 n.1) on *United States* v. *Healy, supra*, and *Panico* v. *United States*, 375 U.S. 29 (1963), for the proposition that a suggestion for rehearing en banc extends the time for seeking certiorari under Section 2101(c). The *Healy* case involved a petition for rehearing, not a suggestion for rehearing en banc, and the Court's

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.[2]

CHARLES FRIED
Solicitor General

OCTOBER 1986

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analysis was plainly limited to the former. See 376 U.S. at 77, 78-79. And while the Court's opinion in *Healy* does state that in *Panico* an order extending the time to file a petition for certiorari was entered 19 days after en banc review was denied by the court of appeals, *Panico* was a criminal case in which timely filing of the petition was not a jurisdictional prerequisite.

[2]Because this Court is without jurisdiction to entertain the petition, we are not responding to petitioner's contentions on the merits. Those contentions, however, were thoroughly addressed by the court of appeals in its opinion (Pet. App. 1a-17a). We will, of course, respond on the merits if the Court so requests.